

A kick in the teeth? – Exemplary damages for objectively unnecessary treatment without therapeutic effect: *Dean v Phung*

Insurance Update

In the recent decision of *Dean V Phung*¹, the NSW Court of Appeal considered the appropriate damages to be awarded against a dentist who performed unnecessary treatment.

1. The facts

The plaintiff was injured when a log pushed back from a chipping machine and struck him under the chin. The injury was described by experts as “minor trauma” to the chin and front teeth. The defendant, a dentist, carried out root canal therapy, placed crowns on each of the plaintiff’s 28 teeth and bridged the teeth in groups of two and three. Treatment was undertaken over approximately 12 months, during 53 consultations, at a cost of \$73,640. The plaintiff sued the dentist claiming that the treatment was unnecessary and unreasonable².

At trial, the dentist admitted liability in negligence and that the procedures were not reasonably necessary. The issue was whether damages were to be assessed under the *Civil Liability Act 2002 (NSW) (CLA)* or under common law. This was of particular interest to the parties as the CLA excludes claims for exemplary damages, applies a higher discount rate, caps damages for non economic loss and limits the interest recoverable.

The plaintiff submitted that the dentist’s involvement was dishonest and fraudulent and that the CLA did not apply to “civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury” (s3B of the CLA). The dentist denied liability for trespass to the person and any intention to cause injury.

¹ [2012] NSWCA 223 decision date 25 July 2012

² Civil Liability Act 2002 (WA) applies similar caps and limits but does not specifically exclude exemplary damages

Who does this affect?

- Insurers
- Medical Practitioners
- Brokers

Article Highlights

- Exemplary damages can be awarded if a practitioner’s conduct is seen as “reprehensible, highhanded, outrageous or insulting.”
- When injury occurs as a direct result of unwarranted treatments, exemplary damages can apply.
- In the case of *Dean v Phung*, the punitive damages were calculated at \$73,640 and the exemplary damages awarded were in excess of \$1.5 million plus appeal expenses.



The trial Court found that the plaintiff had not discharged the onus of proof to establish that the dentist's involvement was dishonest and fraudulent rather than simply incompetent. The Court assessed damages under the CLA and awarded approximately \$1.4million in damages. As such, exemplary damages were not available. The plaintiff appealed.

2. Section 3B Civil Liability Act³

On appeal, the majority of the Court of Appeal found that s3B of the CLA "*encompassed a broad policy objective*", "*the purpose [of which] was to leave those who committed intentional torts to the operation of the general law*". The critical issue, in determining whether a medical procedure was an intentional act, was whether it was done "*with intent to cause injury*".

The Court of Appeal found that to prove the operation of s3B of the CLA, it was sufficient to establish that the dentist knew at the time of giving the relevant advice that the treatment was not reasonably necessary. The Court held that "*the preferable inference is that the dentist probably did not believe at the time [that he carried out the treatment], that it was necessary given the injury suffered by the appellant*". Basten JA drew this inference from a number of factors, including the consensus of expert evidence which was disparaging of the treatment in light of the seemingly minor injuries – "*none of the experts could envisage circumstances in which a reasonably competent doctor [sic] would believe such irreversible treatment to be warranted*".

The Court of Appeal found that the concessions made by the dentist (that the treatment was unnecessary and inappropriate) were enough to demonstrate that the appellant did not consent to the proposed treatment, because the treatment was not in fact necessary for his condition. Accordingly, the treatment constituted a trespass to the person.

The original judgement was set aside so that damages could be increased and exemplary damages could be considered.

3. Exemplary damages

The dentist accepted that exemplary damages might be awarded where the conduct was "*reprehensible, highhanded, outrageous or insulting*"⁴ but submitted that this case did not warrant such a punitive award. The Court of Appeal considered that exemplary damages were warranted, as the dentist's course of conduct was carefully planned and carried out over an extended period of time. There was evidence that the dentist's insurer met the cost of the original award of damages and he remained unjustly enriched to the value of \$73,640. The Court of Appeal decided that an amount of \$150,000 exemplary damages was warranted. Judgment was awarded in favour of the appellant and damages

³ Equivalent to s.3A Civil Liability Act 2002 (WA)

⁴ adopting language from *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40

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were increased to \$1,743,000 plus costs of the appeal. Whilst the *Civil Liability Act 2002* (WA) does not specifically exclude exemplary damages, the principles applied by the NSW Court of Appeal are still relevant.

Exemplary damages go beyond compensation and are awarded “as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself”⁵. The Court of Appeal seemingly considered the dentist’s insurance cover for the original award of damages as a relevant factor when considering exemplary damages (which are usually excluded from insurance cover as a matter of public policy). In circumstances where health practitioners must not practise unless appropriate professional indemnity insurance arrangements are in force⁶, should we expect more frequent awards of exemplary damages?

Awards of exemplary damages in Australia have been relatively infrequent and there is debate as to whether they are an appropriate remedy in civil law, particularly when the same conduct may be the subject of criminal or disciplinary prosecution. Recent press reports indicate that a disciplinary investigation is on foot, so there exists potential for a fine to be imposed by the disciplinary tribunal. Whilst the purpose of disciplinary proceedings is consistently stated to be protection of the public and not punishment of the practitioner, it appears, at least on face value, that the dentist may in effect be punished twice.

⁵ *Wilkes v Wood* [1763] EngR 103

⁶ s.129(1) of the Health Practitioner Regulation National Law (WA) / (NSW) No 86a

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